U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 17Oct2002

CASE NO. 2002-LHC-68

OWCP NO.: 07-138715

IN THE MATTER OF

GARY P. RIDDLE,
Claimant

v.

CAMCO INTERNATIONAL, INC.,
Employer

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,
Carrier

APPEARANCES:

Ed Barton
John McElroy
On behalf of Claimant

William Gregory Merritt
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Gary Riddle (Claimant) against Camco International, Inc., (Employer), and National Union Fire Insurance Company of Pittsburgh (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on July 26, 2002, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant, his spouse, and two vocational experts testified at the hearing. Claimant introduced twelve exhibits, which were admitted, including: various Department of Labor filings; the deposition of Dr. Robert Franklin with attached exhibits; medical records of Drs. Robert Franklin, Robert Rivet, and Steven J. Snatic, medical records from Letterle Chiropractic and Walk in Clinic South; and the vocation report of William J. Kramberg with an attached curriculum vitae.[1] Employer introduced twelve exhibits, eleven of which were admitted including: various memoranda to Claimant's personnel file; a job offer and rejection; a termination letter, the depositions of Claimant and Dr. Franklin; the medical records of Dr. Robert Franklin; vocational report of Mr. William Stampley; and indemnity payment records. I rejected Employer's offer of a July 24, 2002 vocational report and labor market survey because it was not timely produced pursuant to my Pre-Hearing Order.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on March 9, 1996, in the course and scope of his employment while in an employer-employee relationship;

2. Employer was advised of the injury on March 10, 1996;

3. No Notice of Controversion was ever filed;

4. An informal conference was held on September 4, 2001;

5. Claimant's average weekly wage at the time of his injury was $1,130.91;

6. Employer paid benefits as follows:
   - A) Temporary total disability benefits from March 23, 1996, to October 7, 1996, at the rate of $753.98 per week;
   - B) Partial disability benefits from October 8, 1996, to May 22, 2001, at the rate of $527.29 per week,
   - C) Partial disability benefits from May 23, 2001, to the present at a rate of

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

$380.61 per week;

D) Medical benefits; and

7. Claimant reached maximum medical improvement on April 28, 1997, and suffers from a permanent disability.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of Claimant's disability, and the availability of alternative employment; and

2. Interest, penalties, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant testified that he was born in 1953, graduated high school in 1971, and attended four quarters of general studies at Louisiana Technical Institute. (Tr. 20-21). After high school, Claimant worked at his parents' grocery store, spent eight months as a roughneck for an oil company, and did some construction work as a helper. (Tr. 46). Claimant began working for Employer on October 31, 1981, as a service specialist. (Tr. 25). Claimant temporarily stopped working for Employer in 1986 due to a slow down in the oil industry, but came back to work in August 1988. (Tr. 25). During the interim period, from 1986-88, Claimant worked at a paper mill in Monroe, Louisiana. (Tr. 46). For the past several years, Claimant has resided in Maurice, Louisiana, and he commutes less than twenty miles to Employer's facility in Broussard, Louisiana. (Tr. 20).

On March 9, 1996, Claimant was finishing a job on an outlying oil rig when he felt a pop in his neck while testing a safety valve. (Tr. 32-34). Claimant took a thirty minute break, and when he left the rig the next morning his neck was hurting. (Tr. 34-35). Claimant returned to Employer's office in Broussard, Louisiana, and presented to Dr. Como, the company physician. (Tr. 35). Dr. Como opined that Claimant had a pulled muscle, but when Claimant went on another job five days later, his pain became severe. (Tr. 35-36). A subsequent MRI showed three problem discs in his cervical spine and Dr. Como sent Claimant to see Dr. Rivet, a neurosurgeon. (Tr. 36).

Meanwhile, on March 12, 1996, Claimant presented to Letterle Chiropractic complaining of right shoulder and neck pain. (CX 9, p. 2). An x-ray was taken and Claimant was assessed with an

acute mild/moderate cervical strain with associated muscle spasms. *Id*. Still experiencing pain, Claimant presented to Walk In Clinic South on March 13, 1996, complaining of right sided neck and shoulder pains related to a workplace injury. (CX 10, p. 1). A March 25, 1996 CT scan of Claimant's cervical spine revealed a large focal disc herniation with displacement and cord compression at C3-4, a small disc protrusion with displacement of the spinal cord at C4-5, and a small soft tissue protrusion without cord displacement at C5-6. (CX 5, p. 12; CX 10, p. 10). The results of the CT scan necessitated a referral to a neurosurgeon. (CX 10, p. 10).

On April 1, 1996, Dr. Rivet, a neurosurgeon, examined Claimant in regards to right side neck and shoulder pain due to a job related injury on March 9, 1996. (CX 7, p. 1). Dr. Rivet attributed the defect at C5-6 present on Claimant's CT scan to spondylitic disease. (CX 7, p. 1). Dr. Rivet also took a lateral view of Claimant's spine and it demonstrated a definite straightening of Claimant's cervical lordotic curve. *Id*. Dr. Snatic, also a neurosurgeon, concurred that Claimant had a large ruptured disc at C3-4, concurred in the need for a myelogram and a following CT scan, and he opined that Claimant could not continue to work offshore. (CX 8, p. 1-2). More diagnostic testing revealed problems at C3-4, C4-5, and C5-6. (CX 7, p. 4). Based on the results and Claimant's symptoms, Dr. Rivet performed an anterior cervical fusion at C3-4 on May 21, 1996. (CX 7, p. 6-7). By September 27, 1996, Claimant was progressing well enough for Dr. Rivet to recommend that Claimant could return to work at a sedentary position to do no more than answer telephones. *Id*. at 12. On October 7, 1996, Claimant began a light duty position with Employer where he was paid $8.50 per hour. (Tr. 47, 199, 254-55). On November 18, 1996, Dr. Rivet turned Claimant's care over to Dr. Franklin to assist in rendering Claimant asymptomatic. (CX 7, p. 14).

Claimant began his pain treatment with Dr. Franklin, a specialist in physical medicine and rehabilitation, on December 3, 1996. (EX 8, p. 17). Dr. Franklin's assessment was status post cervical fusion, degenerative changes in the cervical spine, myofascial pain syndrome, and associated secondary symptoms. *Id*. at 16. Dr. Franklin traced Claimant's pain to several etiologies, began physical therapy, began pain medication, and he authorized Claimant to return to light duty. *Id*.

By February 4, 1997, Claimant reported that he was improving and he demonstrated an improved cervical range of motion and better posture. (EX 8, p. 14). Claimant also tolerated the physical stress of his light duty position well. *Id*. On April 28, 1997, Dr. Franklin noted that Claimant had reached maximum medical improvement but he did not think that Claimant's spine could tolerate offshore duty given his medical history. *Id*. at 13. Dr. Franklin recommended Claimant continue work at light duty and released Claimant from his care. *Id*. Based on correspondence with Dr. Rivet, he knew that Claimant had a suspect disc at the C4-5 level that may need further exploration in the future. (CX 3, p. 15). On July 10, 1997, Dr. Franklin recommended that Claimant's physical activities should not exceed lifting over twenty pounds, Claimant should avoid vibrational stresses, overhead duty, climbing with his upper extremities, and Claimant should have frequent position changes. (EX 5, p. 28). Vibrational stresses that Claimant should avoid included the use of jack hammers, weed eaters, mowers, long car drives, or any other activities that subjects the cervical spine to vibrational stresses. (CX 3, p, 23).

On September 25, 1997, Dr. Franklin approved Claimant's present work situation, which he opined fell into the light/medium level of exertion, and he limited Claimant's lifting to forty pounds. *Id*. Dr. Franklin testified that Claimant's physical condition had not changed, but he knew that Claimant wanted to keep his current job which exceeded the work restriction he placed on Claimant in July. (CX 3, p. 26). In January 1998, Claimant was involved in an automobile accident whereby the company truck he was driving had to be replaced. (Tr. 89-90, 95, 146). Claimant reported, however, that he did not receive any injuries in the accident. (Tr. 95).

In August or September 2000, Employer offered Claimant a position as a full time tool supervisor, who would dispatch tools and equipment. (EX 1, p. 1). After thinking about the offer, Claimant declined because he did not think he could afford to take the position as a result of his workers' compensation situation and did not think he could physically perform the job. (Tr. 66-67; EX 1, p. 1). Dr. Franklin stated that the job was reasonable for Claimant to undertake as long as the drive to and from work was not excessive, he did not have to go offshore and the had an assistant to help him lift heavy objects. (CX 3, p. 59-60). Prior to February 6, 2001, Employer allegedly offered Claimant a position as a service supervisor in Lafayette. (EX 2, p. 1). Claimant allegedly declined this position reasoning that Employer could terminate him at any time and he would have lost his workers' compensation protections. *Id*. On March 8, 2001, Employer allegedly offered a position as the Health Safety and Environment (HSE) coordinator for Employer but Claimant again allegedly refused because he did not want to lose the protections of his workers' compensation benefits. (CX 3, p. 1). Claimant testified that Employer never offered him positions as the HSE coordinator or as a service supervisor, because if Employer had offered him those positions, he would have accepted. (Tr. 71, 113, 234-35). Dr. Franklin approved both jobs for Claimant. (CX 3, p. 60-61).

Finally, on May 22, 2001, Employer offered Claimant a position as a functional test inspector at its Houston, Texas facility. (EX 4, p. 1). The job paid $14.00 per hour and Employer offered to pay relocation expenses. *Id*. Claimant refused to accept this position because he did not want to move to Houston and he did not think he was physically capable of performing the job. (Tr. 74-76; EX 4, p. 1). On May 25, 2001, Employer informed Claimant that it was closing its Broussard, Louisiana facility and eliminating all staff positions, including Claimant's job. (EX 5, p. 1). Subsequently, Claimant attempted to obtain certification to drive a school bus, but Dr. Franklin told Claimant that the job was not suitable because it involved too much vibrational stresses. (Tr. 99).

In his May 2002, deposition, Dr. Franklin related that the restriction of no vibrational stresses, no overhead duty and frequent positional changes were still applicable to Claimant. (CX 3, p. 34). Regarding Claimant's lifting restriction of forty pounds, Dr. Franklin stated that the limit depended on the particular job, but he preferred a maximum lifting of twenty pounds with a more repetitive maximum lifting of ten pounds. *Id*. at 35. Dr. Franklin stated that he could be flexible in assigning a maximum lifting of forty pounds based on the job and type of lifting involved. *Id*. The maximum lifting requirement also corresponded to other tasks such as pushing, pulling, lifting and carrying. *Id*. at 36. In July 2002, Employer's vocational expert identified several dispatching jobs available to Claimant and Dr. Franklin opined that a job as a dispatcher sounded reasonable based on Claimant's physical restrictions. (CX 3, p. 58-59; EX 10).

B. Claimant's Testimony

Claimant testified that his pre-injury position as a service specialist entailed installing and troubleshooting Employer's equipment offshore and running Employer's equipment into the oil and gas wells. (Tr. 25-26). Claimant also installed gas lip mantles, gas lip valves, and safety valves. (Tr. 26). He used mostly hand tools, consisting of wrenches, pliers, and tubing cutters, and he carried a tool box, brief case, and a duffle bag to each job. (Tr. 30). The equipment Claimant used ranged anywhere from fifty to one-thousand pounds. (Tr. 31-32).

Regarding the restrictions set for him by Dr. Franklin, Claimant testified that he observed his limitations. (Tr. 39). Claimant testified that whenever he did housework or played golf he experienced a needle like sharp pain on top of an underlying throbbing ache. (Tr. 39-40). Even sitting for twenty or thirty minutes hastened on onset of needle-like pain which necessitated the use of the pain medication Ultram or extra strength Tylenol. (Tr. 40). On average, Claimant testified that he took the pain medication Ultram two to three times per day and took Tylenol three to four times per day. (Tr. 40-41). Five or six times per day Claimant laid down to rest for up to three hours at a time. (Tr. 41). Within the past two years, Claimant testified that his pain had increased. (Tr. 43).

Claimant testified that following his injury in 1996, Employer provided him with a light duty position whereby he was allowed to take breaks when he needed to and rest his neck on a sofa. (Tr. 41-42). He spent about eighty percent of his time answering the telephone. (Tr. 47). The rest of the time he filled out paperwork, or checked to make sure Employer had the proper tools and equipment. (Tr. 47-48). Checking on tools and equipment required Claimant to do some lifting, but he attempted to comply with Dr. Franklin's restrictions, and Employer reasonably tried to accommodate Claimant by providing an assistant, an overhead crane, and allowing Claimant to to take five or six breaks during the day. (Tr. 48-49). Occasionally, Claimant had to serve as a hot shot driver to load and deliver equipment to Employer's facility in Houma. (Tr. 120-21). The drive to Houma was between a three and four hour round trip and Claimant testified that he was capable of making the journey. (Tr. 120-21).

After his surgery in 1996, Claimant testified that his activities of daily living were reduced. (Tr. 42). He could cut his grass using a riding lawnmower, but he was unable to do any lawn trimming work. (Tr. 42). Mowing the yard changed from a chore that lasted a hour-and-a-half, to a chore that lasted four hours. (Tr. 42). Claimant no longer went bowling or fishing, activities that he enjoyed prior to his injury. (Tr. 42-43). Claimant's sleep was interrupted so that he was awake all hours of the night. (Tr. 43). The longest drive Claimant had undertaken since his injury was three to four hours, and after enduring that trip, he had to lay down to rest. (Tr. 44). A normal day consisted of making his bed, eating, and laying down. (Tr. 47). Prior to his injury, Claimant played golf four or five times per month, and he continued that practice within six or seven months after undergoing surgery. (Tr. 85-86). Claimant rode in a golf cart and played eighteen holes. (Tr. 88). Claimant did not lay down on the golf course, but he took his time to play. (Tr. 96). Prior to his accident, Claimant had a handicap of four to six, and after his accident, Claimant's handicap jumped to the twelve to twenty range. (Tr. 97).

Regarding discussions about different positions he could fulfill within Employer's facility, Claimant testified that he did not recall that he was ever seriously considered for a position as a salesman. (Tr. 64-65). Claimant testified that he would have taken the job, he was interested, but the job was filled by another person. (Tr. 234-35). Regarding the position as a tool supervisor, Claimant related that it entailed keeping track of all tools, repairing them and tearing them down. (Tr. 66). The position required Claimant to lift weights in excess of one-hundred pounds and Clamant did not think he would be able to do the job even with the help of an assistant because such a helper would not always be available. (Tr. 66-67, 107). Merely to break down tools would require Claimant to use a pipe wrench that weighed thirty pounds and a "cheetah pipe" that weighed ten to fifteen pounds. (Tr. 68).

Concerning a job as a service supervisor, Claimant recalled having discussions about the job with Mr. Reilly, but did not remember that Mr. Reilly ever formally offered the position to him. (Tr. 70). Claimant thought he could do the work, but after he voiced concerns about what would happen to his workers' compensation benefits if Employer closed the facility, Mr. Reilly never formally offered Claimant the job. (Tr. 113). Nonetheless, Claimant actually performed the duties of a service supervisor for the months of March, April, and May of 2001, without having the actual title. (Tr. 131). While he understood Employer's offers to be promotions, he never discussed salary. (Tr. 64-65).

Regarding a job as the HSE coordinator, Claimant testified that there were no physical requirements that were beyond his limitations, but Mr. Reilly never formally offered him the position. (Tr. 71). Claimant did not want to take the job as a functional test operator in Houston, Texas because the position entailed breaking down and repairing safety valves, and required lifting of up to eighty pounds. (Tr. 74-75). Also, some of the testing lasted up to twenty hours, and he would not be able to conduct such testing because he needed frequent breaks. (Tr. 75). Furthermore, when the Employer offered that job in May 2001, Claimant did not want to move to Houston because he had an established home in Louisiana and had lived in a small community all his life. (Tr. 75-76). Employer had two other facilities in or near Broussard, Louisiana, but Claimant was not offered a position at either place. (Tr. 79).

Shortly after Employer laid Claimant off in May 2001, his spouse almost died from a bleeding stomach ulcer, and he spent five to six weeks helping her to recover. (Tr. 51). After that Claimant attempted to find work as a school bus driver and completed his safety classes in December 2001. (Tr. 52). Dr. Franklin, however, refused to release Claimant to drive a school bus in January 2002, and Claimant abandoned his endeavor to obtain certification. (Tr. 53). In May 2002, Claimant made two job inquiries at golf pro shops, but Claimant had not heard back from those employers. (Tr. 53-54). Claimant's counsel also forwarded Claimant a list of jobs provided by Employer's vocational counselor, and Claimant attempted to find one of the jobs that Employer listed. (Tr. 55). Claimant applied to Sam Broussard Trucking, Ace Transportation, Dynasty, and Frank's Casing Crew but was without success. (Tr. 55).

Claimant contacted Sam Broussard Trucking in person on July 11, 2002. (Tr. 55-56). The

location was in New Iberia, Louisiana, which was thirty-five miles from Claimant's home. (Tr. 56). An employee took Claimant's information in reference to a dispatching job, but the position required a lot of computer skills which Claimant did not think he possessed. (Tr. 56-57). Also the position required twelve hour shifts, which Claimant did not think he could do because he only worked eight hour shifts for Employer, and Sam Broussard Trucking, unlike Employer, would not allow him to take five or six breaks during the day. (Tr. 58). A special reclining chair with neck support would benefit Claimant, but he would need more than the three breaks a day that Sam Broussard Trucking allowed. (Tr. 58-59).

Claimant also contracted Ace Transportation, in Broussard Louisiana, on July 11, 2002. (Tr. 59). Broussard was approximately eighteen miles from Claimant's home. (Tr. 61). Claimant made a written application for a dispatcher position, the qualifications for which were basically the same as Sam Broussard Trucking. (Tr. 60-61). Ace Transportation apparently did not have any openings, no employee of Ace Trucking had contacted Claimant, and Claimant did not think he could perform the work for the same reason that he would not be able to work for Sam Broussard Trucking. (Tr. 61).

Claimant also applied for a job with Dynasty Transportation on July 11, 2002, but Dynasty was not accepting applications and informed Claimant that only one employee had left in the past eight years. (Tr. 62). On July 10, 2002, Claimant spoke on the telephone with an employee of Frank's Casing Crew and learned that Frank's required two years of dispatching, and a lot of computer skills. (Tr. 62). While working for Employer, Claimant dispatched five service personnel, but Frank's dispatcher would coordinate fifty to one-hundred trucks and fifty to one-hundred personnel. (Tr. 62-63). At the time Claimant applied, Frank's did not have an opening. (Tr. 63). Claimant never applied for any position in Lake Charles, Baton Rouge, or New Orleans, because those cities were over seventy-five mile one way and were just too far to commute. (Tr. 79-80). Claimant simply did not think he could commute two hours one way to either Lake Charles or Baton Rouge, work a full day and then commute back. (Tr. 124).

C. Testimony of Loretta Ann Riddle

Ms. Riddle, the spouse of Claimant, described Claimant's pre-injury physical activities as very active because he was either working, playing golf, bowling, or playing at a ball park. (Tr. 156). After Claimant's injury, Ms. Riddle no longer went bowling with Claimant, and Claimant was not nearly as active. (Tr. 157). When Claimant played golf following his surgery, he came home pale, shaking, had migraine headaches, and sometimes vomited. (Tr. 158). During the time that Claimant was on light duty with Employer, Claimant came home, took a hot bath, ate and went to bed. (Tr. 158). Ms. Riddle could tell that Claimant's pain today was greater than it was following his surgery. (Tr. 159). Whenever the family took the three hour trip to Jonesboro to visit Claimant's mother, Claimant wold have to lay on the sofa for a time after they arrived. (Tr. 159-60).

D. Deposition Testimony of Denis Reilly

Mr. Reilly was the former operations manager for Employer in Broussard, Louisiana, until Employer closed that facility in May 2001, and then Mr. Reilly moved to Calgary, Canada to a position Employer offered him there. (EX 6, p. 3-4). While stationed in Broussard, Mr. Reilly supervised Claimant who was a service specialist on restricted duty. *Id*. at 5. Based on his knowledge of Claimant, Mr. Reilly testified that Claimant was a good employee who was generally conscientious, worked well, was knowledgeable and productive. *Id*. 34-35. Mr. Reilly testified that Claimant's duties consisted of care-taking redressing tools, taking telephone calls and dispatching personnel offshore. *Id*. Should Claimant have to lift an object over forty pounds, then he had the use of an overhead crane, and there were plenty of other personnel in the office that could assist him. *Id*. at 6.

Regarding the job as a tool supervisor that Employer offered Claimant, Mr. Reilly testified that he participated in creating the position description and actually modified it twice so that it would fit within Claimant's limitations. (EX 6, p. 7). The job did not require that Claimant change locations and it basically repeated many of the same functions that Claimant was already performing. *Id*. Some of the tools Claimant would deal with would weigh over forty pounds, but he had the assistance of other personnel as well as the overhead crane. *Id*. at 8. The position paid approximately $4,800 per month. *Id*. Mr. Reilly stated that Claimant refused the job because he feared that he would lose the protections provided to him by workers' compensation. *Id*. at 9.

Mr. Reilly also testified that he offered Claimant a position as the HSE coordinator, based on Claimant's past performance in conducting monthly safety meetings and his activity in sending health, safety, and environmental records to the State. (EX 6, p. 11). The position was located at the same facility where Claimant was currently working. *Id*. at 12. The position was largely sedentary and there were no heavy objects to lift that would exceed Claimant's lifting restrictions. *Id*. at 13. Claimant would have to undergo a short training period that would not likely last for more than one week. *Id*. at 13. Like the tool supervisor, the job as the HSE coordinator paid $4,800 per month. *Id*. at 14. Again, Claimant refused the position because he feared losing the protections that the workers' compensation statutes provided to him. *Id*.

Mr. Reilly also offered Claimant a position as a service supervisor in the Broussard facility that consisted of overseeing all the people working in the service department, making sure that individuals received training, that tools were taken care of, and that inventory was sufficient to cover Employer's customer base. (EX 6, p. 16). No training was needed for Claimant and the position was modified so that Claimant would not exceed his work restrictions. *Id*. at 16-17. The position paid $4,800 per month. *Id*. at 17. Claimant refused the job because he was concerned about losing the protections afforded him under the workers' compensation statutes. *Id*.

In May 2001, Employer made a corporate decision to close its Broussard facility due to economic reasons and the movement of major oil companies to either Houston or New Orleans. (EX 6, p. 20). All service personnel were maintained, only now their supervisor would be located in Houston and they would work out of their houses. *Id*. at 21. Claimant was not a service hand, so to maintain his job with Employer he would have to physically move to Houston, Texas, where

Employer offered him a position as a functional test inspector. *Id*. at 21-22. That job required the personnel to assemble subsurface safety valves and then pressure test them. *Id*. at 22. Parts of that job would require Claimant to lift more than forty pounds, but the facility had an overhead crane and the Houston facility had a warehouse man to assist Claimant in lifting. *Id*. The position also required a lot of standing, but Claimant could use a stool. *Id*. at 23. The job paid $14.00 per hour, the work week was forty hours, and Claimant was not required to undergo any additional training. *Id*. at 23.

Once the Broussard facility was closed, Employer had no need for the other positions that it had offered to Claimant. (EX 6, p. 27). No job that Mr. Reilly offered Claimant at the Broussard facility were filled by other personnel or new hires. *Id*. at 31. Both the service supervisor and HSE coordinator position were not filled because of the pending the closing of the Lafayette facility and once a person was hired, they would have no place to work in Lafayette after May 2001. *Id*. The tool supervisor position that was offered to Claimant in the year 2000 was simply never filled. *Id*. In discussing job options with Claimant, Mr. Reilly testified that Claimant had voiced concerns about his future if the Lafayette facility was shut down. *Id*. at 34.

D. Exhibits

(1) Medical Records from Letterle Chiropractic

On March 12, 1996, Claimant presented to Letterle Chiropractic complaining of right shoulder and neck pain. (CX 9, p. 2). An x-ray was taken and Claimant was assessed with an acute mild/moderate cervical strain with associated muscle spasms. *Id*. Claimant's prognosis was good, with no permanent impairment, and he was treated with hot packs and spinal manipulation. *Id*.

(2) Medical Records from Walk In Clinic South

On March 13, 1996, Claimant presented to Walk In Clinic South complaining of right sided neck and shoulder pains related to a workplace injury. (CX 10, p. 1). Claimant received conservative treatment and was instructed the use heat packs and return to work. *Id*. at 5. By March 21, 1996, a physician diagnosed cervical strain and instructed Claimant to exercise his neck and restricted Claimant to two days of light duty. *Id*. at 8. On March 25, 1996, Claimant complained of increased pain symptoms and a physician ordered a CT scan of Claimant's cervical spine. *Id*. at 10. Based on the results, Claimant was referred to a neurosurgeon. *Id*. at 14.

(3) Medical Records of Dr. J. Robert Rivet and Steven J. Snatic

On April 1, 1996, Dr. Rivet, a neurosurgeon, examined Claimant on the referral from Dr. Snatic, also a neurosurgeon, in regards to right side neck and shoulder pain due to a job related injury on March 9, 1996. (CX 7, p. 1). A CT scan of Claimant's cervical spine dated March 26, 1996, demonstrated a large focal disc herniation with displacement and cord compression at C3-4, a small disc protrusion with displacement of the spinal cord at C4-5, and a small soft tissue protrusion without cord displacement at C5-6. (CX 5, p. 12). Dr. Rivet attributed the defects at C5-6 to

spondylitic disease. (CX 7, p. 1). Dr. Rivet took a lateral view of Claimant's spine and it demonstrated a definite straightening of Claimant's cervical lordotic curve. *Id*. Carrier, however, denied permission to perform a cervical myelogram with a post myelogram CT scan. *Id*. at 2-3. Significantly, on April 19, 1996, Claimant had reported no arm pain and decreased shoulder pain. *Id*. at 3.

In light of Carrier's refusal to authorize further testing, Dr. Rivet referred Claimant back to Dr. Snatic, who concurred that Claimant had a large ruptured disc at C3-4, concurred in the need for a myelogram and a following CT scan, and he opined that Claimant could not continue to work offshore. (CX 8, p. 1-2). Following Dr. Snatic's opinion, Claimant underwent the diagnostic testing and it revealed problems at C3-4, C4-5, and C5-6. (CX 7, p. 4). Based on the results and Claimant's symptoms, Dr. Rivet recommended surgery to remove the disc at C3-4. *Id*.

Dr. Rivet performed an anterior cervical fusion on May 21, 1996. (CX 7, p. 6-7). On a May 24, 1996 follow-up visit, Dr. Rivet remarked that Claimant felt great and that he no longer had shoulder or right arm pain. *Id*. at 8. By September 27, 1996, Claimant was progressing well enough for Dr. Rivet to recommend that Claimant could return to work at a sedentary position to do no more than answer telephones. *Id*. at 12. On November 18, 1996, Dr. Rivet noted that Claimant was working at light duty full time and that he was having symptoms of burning in his neck to the midline of his back. *Id*. at 14. Dr. Rivet turned Claimant's care over to Dr. Franklin to assist in rendering Claimant asymptomatic. *Id*.

(4) The Deposition and Medical Records of Dr. Robert Franklin

Claimant began treatment with Dr. Franklin, a specialist in physical medicine and rehabilitation, on December 3, 1996. (EX 8, p. 17). As a result of his March 3, 1996, workplace accident, Claimant related that he experienced intermittent to occasional moderate pain. *Id*. His pain was aggravated by standing, he felt better by lying down, and his pain occasionally interfered with his sleep. *Id*. Dr. Franklin's assessment was status post cervical fusion, degenerative changes in the cervical spine, myofascial pain syndrome, and associated secondary symptoms. *Id*. at 16. Dr. Franklin traced Claimant's pain to several etiologies and began physical therapy and pain medication. *Id*. He also authorized Claimant to return to light duty. *Id*.

By February 4, 1997, Claimant reported that he was improving and he demonstrated an improved cervical range of motion and better posture. (EX 8, p. 14). Claimant also tolerated the physical stress of his light duty position well. *Id*. On April 28, 1997, Dr. Franklin noted that Claimant had reached maximum medical improvement, but he did not think that Claimant's spine could tolerate offshore duty given his medical history. *Id*. at 13. Dr. Franklin recommended Claimant continue work at light duty and released Claimant from his care. *Id*. Based on correspondence with Dr. Rivet, he knew that Claimant had a suspect disc at the C4-5 level that may need further exploration in the future. (CX 3, p. 15). Claimant had a history of heavy manual type labor in the oil field, underlying degenerative changes in his cervical spine, epidural scaring from his cervical fusion, bad posture, and soft tissue type problems. *Id*. at 16-17. Thus, Claimant had numerous

etiologies for his pain symptoms and Dr. Franklin was not able to pinpoint the exact source of Claimant's pain. *Id*. On July 10, 1997, Dr. Franklin recommended that Claimant's physical activities should not exceed lifting over twenty pounds, Claimant should avoid vibrational stresses, overhead duty, climbing with his upper extremities, and Claimant should have frequent position changes. (EX 5, p. 28). Vibrational stresses that Claimant should avoid included the use of jack hammers, weed eaters, mowers, long car drives, or any other activities that subjected the cervical spine to vibrational stresses. (CX 3, p, 23).

On September 25, 1997, Claimant returned to see Dr. Franklin complaining of neck and upper back pain with symptoms reaching his right hand. (EX 8, p. 13). Dr. Franklin merely continued Claimant on a home program and recommended that Claimant take over the counter pain medication. *Id*. Dr. Franklin also stated that Claimant could continue his work, which he opined fell into the light/medium level of exertion, and he limited Claimant's lifting to forty pounds. *Id*. Dr. Franklin testified that Claimant's physical condition had not changed, but he knew that Claimant wanted to keep his current job which exceeded the work restriction he placed on Claimant in July. (CX 3, p. 26).

On May 4, 1998, Claimant reported weak and dizzy spells to Dr. Franklin and pains in his right upper extremity that he had not experienced before. (CX 3, p. 27; EX 8, p. 12). Dr. Franklin did not change Claimant's work restrictions, but he suggested a cervical MRI scan to help determine if Claimant's symptoms had a cervical pathology. (EX 8, p. 12). The May 7, 1998 MRI showed a solid anterior fusion with no evidence of recurrent disc disease at C3-4, and small central soft tissue ridging at C4-5, and C-5-6, as well as two disc bulges at C4-5 and C5-6. (CX 3, p. 28; CX 5, p. 33). Based on the MRI, Dr. Franklin did not think Claimant needed surgical intervention, but Claimant may need a second cervical operation at some point in the future. (CX 3, p. 29-30). Claimant returned to see Dr. Franklin in November 1998, and in May 1999, with persistent symptoms, but Dr. Franklin did not undertake any action. (EX 8, p. 10-11). In November 1999, Carrier contacted Dr. Franklin asking that he request a functional capacity evaluation. *Id*. at 9. Apparently, Claimant never undertook the functional capacity evaluation, (CX 3, p. 31), and he merely returned to see Dr. Franklin on May 8, 2000, August 17, 2000, November 16, 2000, February 12, 2001, June 21, 2001, October 2, 2001, January 7, 2002, and April 8, 2002, complaining of persistent and static symptoms. (EX 8, p. 1-8).

Currently, Dr. Franklin related that the restriction of no vibrational stresses, no overhead duty and frequent positional changes were still applicable to Claimant. (CX 3, p. 34). Regarding Claimant's lifting restriction of forty pounds, Dr. Franklin stated that the limit depended on the particular job, but he preferred a maximum lifting of twenty pounds with a more repetitive maximum lifting of ten pounds. *Id*. at 35. Dr. Franklin was stated that he could be flexible in assigning a maximum lifting of forty pounds based on they job and type of lifting involved. *Id*. Dr. Franklin used a maximum lifting requirement to refer to other tasks such as pushing, pulling, lifting and carrying. *Id*. at 36.

The fact that Claimant may be playing golf once or twice a month since December 1996 did

not surprise Dr. Franklin, and he stated that golf had a greater affect on the lumbar spine than the cervical spine. (CX 3, p. 46-47). Nonetheless, he would recommend that Claimant not engage in a rotational sport like golf, and would not recommend riding in a golf cart, which could cause vibrational stresses, and he would not recommend carrying golf clubs that weighed over twenty pounds. *Id*. at 47-49. The fact that Claimant engaged in such activities through the years did not cause Dr. Franklin to reassess his set restrictions. *Id*. at 50-51. Rather, Claimant was doing well post-operatively, and if Claimant wanted to play some golf, or subject himself to some vibrational stresses then Claimant was putting himself at risk, but it was probably okay to perform a few such activities of daily living. *Id*. at 51. The fact that Claimant never complained to Dr. Franklin that playing golf or mowing his lawn indicated that Claimant could tolerate such activities at least intermittently. *Id*. at 52.

Regarding a position as a dispatcher/assistant manager that worked twelve hour days in Broussard Louisiana, and a position as a dispatcher for Speciality Rental Tools Co., Dr. Franklin stated that the jobs seemed reasonable based on Claimant's physical limitations. (CX 3, p. 58-59). Regarding a tool supervisor position, that did not involve offshore work and for which Claimant had an assistant to lift tools, Dr. Franklin stated that the job was reasonable for Claimant to undertake as long as the drive to and from work was not excessive. *Id*. at 59-60. Likewise a job as a HSE safety worker, service supervisor, and the job Employer offered Claimant in Houston may also be suitable for Claimant. *Id*. at 60-61.

(5) Employer's Personnel File

A note to Claimant's personnel file, dated October 8, 2000, reflected that Employer offered Claimant a position as a full time tool supervisor, who would dispatch tools and equipment. (EX 1, p. 1). After thinking about the offer, Claimant declined because he did not think he could afford to take the position as a result of his workers' compensation situation. *Id*. On February 6, 2001, Employer made another notation that it had offered Claimant a position as a service supervisor in Broussard, that gave Claimant the opportunity to come off of workers' compensation and have periodic salary increases. (EX 2, p. 1). Claimant declined this position also reasoning that Employer could terminate him at any time and he would have lost his workers' compensation protections. *Id*. On March 8, 2001, Employer offered a HSE position to Claimant with the intent to end his workers' compensation payments and Claimant again refused because he did not want to lose the protections of his workers' compensation benefits. (CX 3, p. 1).

Finally, on May 22, 2001, Employer offered Claimant a position as a functional test inspector at its Houston, Texas facility. (EX 4, p. 1). The job paid $14.00 per hour and Employer offered to pay relocation expenses. *Id*. Claimant refused to accept this position. *Id*. On May 25, 2001, Employer informed Claimant that it was closing its Broussard, Louisiana facility and eliminating all staff positions, including Claimant's job. (EX 5, p. 1).

(6) Testimony and Vocational Report of William Stampley, Jr.

Mr. Stampley met with Claimant on May 3, 2000 and he reviewed Claimant's medical records from, *inter alia*, Drs. Snatic, Rivet and Franklin, as well as a number of rehabilitation reports from MEDINSIGHTS, Inc. (EX 9, p. 1). In Achievement tests, Claimant demonstrated the ability to identify words at a 11.9 grade level, pronounce words, comprehended reading passages at a 7.6 grade level - a score Mr. Stampley found "confounding" - and he performed mathematical computations at 12.2 grade level. *Id*. at 6-7. An intelligence test indicated that Claimant's score was average, and ranged between 94 and 116. *Id*. at 6. A career assessment inventory indicated that Claimant tended to prefer occupations such as sales, managing, buying, politics, merchandising and business. *Id*. Considering the fact that Claimant had not had formal classes in over thirty years, Mr. Stampley testified that Claimant's scores were above average and his intelligence would be a bonus in searching for a job. (Tr. 178). Also the fact that Claimant had worked eighteen out of the past twenty years for the same employer showed that he had a strong work ethic and would help him in applying for another job. (Tr. 179-80).

Mr. Stampley testified that Claimant could not perform his former job with Employer. (Tr. 197). Taking Claimant's age, education, work experience, test scores, stated physical capabilities and transferrable skills, Mr. Stampley opined that Claimant was capable of performing the following types of jobs: electrician helper, paving equipment operator, assembler, highway maintenance worker, cabinet assembler, forklift and tractor operator, retail store manager, market manager, automobile rental and sales clerk, sales clerk, and gate guard, all of which had physical demands in either the light or medium category of exertion. (EX 9, p. 7). Based on Dr. Franklin's 2002 statement that Claimant should avoid vibrations, Mr. Stampley testified that the restriction would eliminate positions as a paving equipment operator and a forklift and tractor operator. (Tr. 238-39). This list of jobs showed only existing jobs in the Lafayette area, and did not represent jobs that were actually available. (Tr. 204-05). Additionally, Mr. Stampley thought that Claimant was qualified to perform work as an oilfield dispatcher based on his past experiences. (EX 9, p. 8). To obtain a job as a dispatcher, especially one of the high profile positions that pay approximately $24,960.00 per year, Claimant would have to obtain more computer experience, learn new software packages and increase his typing sped. (Tr. 184-85). His oil field experience and knowledge, however, are more important than his typing speed or computer background. (Tr. 185). After two to three months of training, Mr. Stampley estimated that Claimant would be well qualified for a position as a dispatcher. (Tr. 185).

In a June 7, 2000 Labor Market Survey, Mr. Stampley identified the following jobs:

Dispatcher/Assistant Manager - the position is located in Broussard, Louisiana, the work week is Monday through Friday from 6:00 a.m. to 6:00 p.m. and it pays $7.50 to $8.00 per hour. The position is sedentary.

Dispatcher - the position is located in Broussard, Louisiana, the job is sedentary, the salary ranges from $1,500 to $2,000 per month, and the job requires knowledge of oilfield rental tools.

Trucking Dispatcher - the position is located in Broussard, Louisiana, the position is sedentary, and the work week is 6:00 p.m. to 6:00 a.m., Monday through Friday, with a half day on Saturday every third week. The position paid $1,800 per month.

Radio Communications Operator - this position ins located in New Orleans, Louisiana at the Port of New Orleans, and is a State civil service position. The position ins sedentary with entry level wages of $1,043 per month.

When Mr. Stampley conducted this labor market survey, Claimant was working for Employer at $8.50 per hour with benefits such as group hospitalization, major medical, life insurance, dependent coverage, 401K, and Claimant had a beneficial long term relationship with Employer, who was making great accommodations for him. (Tr. 198-99). Mr. Stampley testified that Claimant's decision to stay with Employer in June 2000 was reasonable because it was not uncommon for an individual to take light duty work status while recovering from an injury and forego the potential to make a higher hourly wage elsewhere. (Tr. 202).

On July 2, 2002, Mr. Stampley updated his labor market survey to include additional jobs that were available to Claimant in July 2002. (EX 10, p. 1). Those positions included:

Parts Store Operator - this position is located in Baton Rouge, Louisiana, with the Department of Transportation and Development and entry level pay is between $8.19 and $13.55 per hour. The job entails ordering, receiving, inspecting and storing parts for vehicles and heavy equipment. The physical exertion level is light to medium with a maximum lifting of thirty pounds. A college degree is preferred.

Dispatcher - this position is with Sam Broussard Trucking located in New Iberia, Louisiana and entails answering telephones, using a computer, and talking to drivers on a radio. Two years of dispatching experience is preferred. The position is full time and sedentary and pays an hourly rate of $8.65 to $10.57 per hour.

Dispatcher - this position is with Frank's Casing Crew and Rental Tools located in Lafayette, Louisiana, and entailed receiving incoming calls, checking incoming and outgoing tools, and making decision of what tools to send on a job. The position is full time at forty to sixty hours per week, and pays $8.00 per hour without oil field experience, $10.00 per hour with oilfield experience and $11.00-$12.00 per hour with oilfield dispatching experience.

Trucking Dispatcher - this position is with Ace Transportation located in Broussard, Louisiana, and entails taking calls and dispatching trucks from the terminal site and troubleshooting for customer calling in orders after hours. Light clerical duties are necessary and oilfield knowledge is helpful. The position is sedentary and pays $1,800 per month, or an hourly rate of $10.38.

Mr. Stampley testified that the jobs as a dispatcher were open from time to time and he was

constantly contacting the dispatching employers for information. (Tr. 196). Regarding the dispatching positions, Mr. Stampley testified that he did not inquire about typing speed, but he thought the Claimant was capable of performing the functions of the job. (Tr. 224-37).

Mr. Stampley testified that if Claimant had to lie down at work several times during a day then most employers would not want to accommodate such disabilities. (Tr. 215). Furthermore, Mr. Stampley testified that an employer would not likely hire a person who was going to miss work due to future surgical needs. (Tr. 228). Mr. Stampley testified that he asked each employer he identified if the position it had fit the physical limitations of Claimant, but he did not ask if Claimant would be able to lie down several time during the day. (Tr. 235).

(7) Testimony and Vocational Report of William J. Kramberg

On May 29, 2002, Mr. Kramberg met with Claimant and reviewed, *inter alia*, the depositions of Claimant and Dr. Franklin, Claimant's medical records, and a report by Mr. Stampley. (CX 12, p. 1). Based off his review of the records, Mr. Kramberg stated that Claimant was restricted to light duty work or "somewhat above" as per his treating physicians recommendations. *Id*. at 3. As a result of his workplace accident, Mr. Kramberg opined that Claimant had sustained a reduction in his ability to access the labor market, a reduction in his earning capacity and a reduction in his work-life expectancy. *Id*.

Regarding Mr. Stampley's June 2000 labor market survey, Mr. Kramberg testified that the money being earned by Claimant while on light duty at Employer's facility fairly and reasonably represented his ability to earn wages, and continued until Claimant was laid off in May 2001. (Tr. 256). Regarding the position with Sam Broussard Trucking, Mr. Kramberg testified that he also contacted the Employer in July 2002, and was informed that Sam Broussard had not hired a dispatcher within the last three months and no position was currently available or available at "any time soon." (Tr. 259-62). Mr. Kramberg also contacted Frank's Casing Crew and Rental Tools and learned that Frank's expected a position as a dispatcher to become available within the next thirty to sixty days. (Tr. 263).

When Mr. Kramberg contacted Ace Transportation, a supervisor told him that Ace Trucking had recently hired a person in regards to the July 2002 position identified by Mr. Stampley. (Tr. 264). When Mr. Kramberg contacted Ace Trucking regarding the June 2000 report, the employer was obtaining individuals with keyboard skills of at least twenty-five words per minute, but when Mr. Kramberg contacted the employer regarding the July 2002 position identified by Mr. Stampley, it was open to training individuals. (Tr. 265). Frank's Casing Crew and Rental Tools informed Mr. Kramberg that it preferred to have an applicant familiar with spreadsheets and Word Perfect. (Tr. 267-68). Mr. Kramberg did not think that Claimant's computer literacy or keyboarding skills were sufficient as of the date of trial to qualify him for a job as a dispatcher. (Tr. 269). Claimant needed a three month computer/keyboarding training period to have a decent chance at obtaining a position as dispatcher. (Tr. 270-71, 273). Based on Claimants immediate skills his chance of obtaining a job is a mere possibility and not a probability. (Tr. 275). If Claimant had to lay down three times a day

due to pain, then Mr. Kramberg testified that Claimant was not employable given his current level of skill and if Claimant did obtain a job, he would not be able to keep it if he needed such an accommodation. (Tr. 289).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he made a credible witness. Claimant acknowledged that he reached maximum medical improvement on April 28, 1997, and asserts he is unable to resume his former job. Establishing a *prima facie* case of total disability, Claimant argues that his light duty position within Employer's facility from October 8, 1996, to May 25, 2001, established his post injury wage earning capacity at $340.00 per week, with a permanent partial disability after April 28, 1997. Any attempt for Employer to establish a higher wage earning capacity based on Mr. Stampley's June 13, 2000 vocational report must fail because Mr. Stampley concluded that the positions he identified did not pay more than Claimant's earnings with Employer. Additionally, Mr. Stampley's June 13, 2000 report did not address job availability or the physical requirements of the particular job, Claimant's ability to perform the job, or the hours involved. Regarding the dispatching positions identified by Employer in July 2002, Claimant contends that he is not currently qualified to hold those positions and nothing requires him to undertake vocational rehabilitation training. Regarding other jobs Employer offered Claimant at its facility, Claimant contends that the positions either exceeded his physical limitations, or were simply never offered to Claimant. Other positions identified by Mr. Stampley were outside of Claimant's geographical area. Accordingly, Claimant contends that when Employer closed its Broussard facility, it withdrew its offer of suitable light duty work and Claimant's *prima facie* case of total disability revived. In the alternative, Claimant contends that if Employer did establish suitable alternative employment then Claimant underwent a diligent job search establishing that there were not any jobs reasonably available to him. Also in the alternative, Claimant asserts that any wage earning capacity established by Employer must be indexed for inflation to accurately reflect the difference between Claimant pre and post-injury earning capacity. Finally, Claimant argues that he is entitled to statutory penalties because Employer reduced his benefits on May 23, 2001, without timely filing a notice of controversion.

Employer contends that Claimant is not a credible witness. Based on Claimant's age, background, experience and post-injury physical limitations, it demonstrated suitable alternative employment following Claimant's injury that were approved by Claimant's physician. Specifically, Employer offered three positions within its facility that gave Claimant the opportunity to earn up to 98% of his pre-injury wages. After Employer closed its Lafayette facility, Employer argues that Claimant unreasonably refused to transfer to a position in Houston, Texas. Regarding Mr. Stampley's July 2002 labor market survey, Employer argues that the positions as a dispatcher were suitable for Claimant and that any computer training Claimant needed he could acquire on the job. Furthermore, a commute to Baton Rouge, Louisiana to obtain employment is reasonable in light of the fact that Claimant regularly traveled that far prior to his injury to reach various Louisiana ports. Claimant's job search was not diligent because he did not file a single application until two months

prior to hearing.

B. Claimant's Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). A claimant's discredited and contradicted testimony is insufficient to support an award. *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980); *Mackey v. Marine Terminals Corp*., 21 BRBS 129, 131 (1988); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

Here, based on the record as a whole, and my observation of Claimant's demeanor, I find that Claimant's credibility is questionable. Employer illustrated several inconsistencies in the record between Clamant's deposition and his trial testimony. First, in his deposition Claimant testified that following his surgery he played golf once or twice a month, but at trial Claimant testified that he played four to six time per month. (Tr. 86-88). Second, Claimant testified at trial that he stopped playing golf around November 1998 - January 1999, because he had lost interest, but he testified in his deposition that he stopped playing golf sometime around November 1999. (Tr. 88-89).

Third, Employer argues that Claimant testified in his deposition that he had not actively sought any employment following his termination by Employer, but at trial Claimant asserted that he had actively pursued training to become a bus driver. (Tr. 81, 98). I do not find this testimony inconsistent, however, because Claimant never applied to such a position after Dr. Franklin advised him that the job exceeded his physical limitations. (Tr. 99). Fourth, Claimant testified in his deposition that he had not turned down any job offers made by Employer, but at trial he admitted that he turned down two jobs. (Tr. 109-111). Fifth, at his deposition Claimant stated that he took five Ultram pills a day to control his pain, but at trial he testified that only took two per day and he told Employer's vocational expert that he did not take any Ultram. (Tr. 81-82, 181). Claimant explained his statements by commenting that the amount of pain medication he takes varies from day to day, but his inconsistent statements were nonetheless misleading. (Tr. 82). Additionally, I also note that Claimant gave inconsistent testimony concerning the year of his automobile accident, (Tr. 94-95), gave inconsistent testimony concerning his typing speed which ranged from thirteen works per minute to twenty-one words per minute, (Tr. 57, 181), and Claimant testified that he was capable of making a three hour round trip to Houma, Louisiana, but his wife testified that a three hour trip to Jonesboro, Louisiana necessitated that Claimant lay on the couch to recover. (Tr. 120-21, 159-60). Accordingly, based on numerous inconsistencies with Claimant's trial testimony, I find that Claimant's credibility is questionable and that his testimony alone is insufficient to establish an award of compensation.

C. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

C(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Employer conceded that Claimant can no longer perform his former longshore job, thus, Claimant established a *prima facie* case of total disability following his March 10, 1996 workplace accident, and that disability manifested on March 23, 1996, when Claimant was taken off work to undergo an eventual cervical fusion.

C(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable

> of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

C(2)(a) Claimant's Age Background, Experience, and Physical Limitations

Claimant testified that he graduated high school in 1971 and attended four quarters of general studies at Louisiana Technical Institute. (Tr. 20-21). After high school, Claimant worked at his parents' grocery store, spend eight months as a roughneck for an oil company and did some construction work as a helper. (Tr. 46). Claimant began working for Employer on October 31, 1981 as a service specialist. (Tr. 25). Claimant temporarily left Employer is 1986 due to a slow down in the oil industry, but came back to work in August 1988. (Tr. 25). During the interim period, from 1986-88, Claimant worked at a paper mill in Monroe, Louisiana. (Tr. 46). For the past several years, Claimant has resided in Maurice, Louisiana. (Tr. 20). In high school, Claimant demonstrated the ability to type between thirteen and twenty-one words per minute. (Tr. 57, 181).

After suffering his workplace injury and undergoing cervical surgery, Dr. Franklin set the following limitations on July 10, 1997: no lifting over twenty pounds, no vibrational stresses, no overhead duty, no climbing with his upper extremities, and Claimant should have frequent position changes. (EX 5, p. 28). Vibrational stresses that Claimant should avoid included the use of jack hammers, weed eaters, mowers, long car drives, or any other activities that subjected the cervical spine to vibrational stresses. (CX 3, p, 23). By September 25, 1997, Dr. Franklin noted that Claimant was working outside of his restrictions and under the particular circumstances of Claimant's light duty position, Dr. Franklin approved Claimant to lift up to forty pounds. (EX 8, p. 13). Dr. Franklin testified that he changed this restriction because he knew that Claimant wanted to keep his job. (CX 3, p. 26). Dr. Franklin related that Claimant's lifting limit depended on the particular job, but he preferred a maximum lifting of twenty pounds with a more repetitive maximum lifting of ten pounds. *Id*. at 35.

C(2)(b) Post Injury Wage Earning Capacity - Employer's Offer of Light Duty and Mr. Stampley's June 13, 2000, Vocational Report

"An award of total disability while a claimant is working is the exception and not the rule." *Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981). *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Thus, injured employees working in pain or in sheltered employment may still receive

total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980) (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979) (extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974) (beneficent employer). If the claimant is performing satisfactorily and for pay, then barring other signs of beneficence or extraordinary effort, the work precludes an award for total disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 334 (1981).

Here, there is no indication that the light duty position as a service specialist that Employer provided Claimant within its facility constitutes sheltered or beneficent employment that required an extraordinary effort from Claimant. Rather, Employer reasonably accommodated Claimant's disability by providing assistance in lifting objects that exceeded his weight restrictions, and allowed Claimant the opportunity to rest on a couch during the day to relieve his neck pain. (Tr. 41-42). Eighty percent of Claimant time was spent answering the telephone and the rest of the time he filled out paper work and checked to make sure Employer had all the proper tools and equipment to perform its various jobs. (Tr. 47-48). The is no dispute that Claimant's job was necessary for Employer's business. The job paid $8.50 per hour and included an employment benefits package. (Tr. 199). Mr. Stampley concluded in his June 13, 2000 vocational report that Claimant's ability to perform other jobs did not exceed his earning capacity with Employer. (EX 9, p. 10). Accordingly, I find that Clamant's post-injury wage earning capacity was $8.50 per hour, or $340.00 per week beginning on October 8, 1996, the day after Dr. Rivet released Claimant to perform sedentary work. (CX 7, p. 13).

C(2)(c) Post Injury Wage Earning Capacity - Employer's Offer of Alternative Employment Within Its Facility

In this case, there are four separate instances of alternative employment within Employer's facility. Of the four offers, Claimant testified that only two positions were actually offered to him and that he only had discussions about two others. I consider each in turn as evidence of Claimant's post-injury wage earning capacity:

C(2)(c)(i) Tool Supervisor

During the months of August and September 2000, Claimant acknowledged that Mr. Reilly offered him a position as a tool supervisor. (Tr. 67; EX 1, p. 1). Claimant related that the job entailed keeping track of all tools, repairing them and tearing them down. (Tr. 66). The position required Claimant to lift weights in excess of one-hundred pounds and Clamant did not think he would be able to do the job even with the help of an assistant. (Tr. 66-67). Claimant also knew that in the course of his duties, an assistant would not always be available. (Tr. 107). Merely to break down tools would require Claimant to use a pipe wrench that weighed thirty pounds, and a "cheetah pipe" that weighed ten to fifteen pounds. (Tr. 68). In an effort to accommodate Claimant, Mr. Reilly testified that he actually modified the position description twice so that it would fit within Claimant's limitations. (EX 6, p. 7). The job basically repeated many of the same function that Claimant was already performing. *Id*. Although Claimant testified that salary was never discussed, Mr. Reilly

testified that the position paid approximately $4,800 per month. *Id*. Dr. Franklin stated the job sounded reasonable as long as it did not involve offshore work and Claimant had an assistant to lift the heavy objects. (CX 3, p. 59-60).

I do not find that the position as a tool supervisor constituted suitable alternative employment for Claimant. When the position was offered to Dr. Franklin for approval, he was instructed that the position entailed taking calls and dispatching tools, and Claimant had the help of an assistant to lift anything heavy. (CX 3, p. 59). This description mischaracterizes the actual work done because Dr. Franklin was not told that the dead weight of the tools used to tear down the equipment exceeded Claimants modified lifting restriction of forty pounds. Dr. Franklin was not instructed that lifting up to forty pounds would become a regular part of Claimant job, when his modified lifting restriction of forty pounds only applied to Claimant's light duty position where he spent eighty percent of the time on the telephone. In a job that entailed more lifting and involved much heavier tools and equipment, I find it unlikely that Dr. Franklin would modify his preferred twenty pound maximum lifting restriction to enable Claimant to undertake this job. Also, I find merit to Claimant's statement that an assistant would not always be available to lift the heavier objects. An assistant may call in sick, or be temporarily dispatched elsewhere, leaving Claimant to perform all job tasks by himself. Accordingly, I find that the job as a tool supervisor exceeds Claimant's physical restrictions and does not constitute suitable alternative employment.

C(2)(c)(ii) HSE Coordinator and Service Supervisor Positions

Claimant recalled having discussions about possible jobs with Mr. Reilly concerning a position as a service supervisor and the HSE coordinator, but he testified that Mr. Reilly never formally offered the jobs to him. (Tr. 70, 71). Mr. Reilly made notations in Claimant's personnel file that he had discussed the position as a service supervisor in January 2001, and discussed the position as the HSE coordinator in "early 2001." (EX 2, p. 1; EX 3, p. 1). Mr. Reilly noted that Claimant refused to fill either position because of concerns over his workers' compensation benefits. (EX 2, p. 1; EX 3, p. 1). Claimant testified that he was physically able to perform both jobs, and actually did perform the job as a service supervisor, without the title, during the months of March, April and May 2001. (Tr. 113, 131). Neither job was actually filled because of the impending closure of the Lafayette facility. (EX 6, p. 30-31). While he understood Employer's offers to be promotions, he never discussed salary. (Tr. 64-65).

I find that based on the record as a whole, Employer never offered the positions of service supervisor or HSE coordinator to Claimant. When Employer wanted to make a job offer, it certainly knew how as reflected by its May 22, 2001, correspondence to Claimant offering him a position in at its Houston facility. (EX 4, p. 1). The only hard evidence in the record are two post hoc noted to Claimant's personnel file (one purportedly written on a Sunday) that reference a vague time frame in which Mr. Reilly discussed the jobs with Claimant. Claimant did not deny that he discussed the jobs or that he voiced concerns about protecting his workers' compensation benefits. Indeed, it seems that Employer would have given Claimant a *de facto* promotion when he undertook the duties of the former service supervisor in the final three months before Employer closed its facility. The fact

that Claimant was never promoted when he was fulfilling the duties of the position is further evidence that Employer never offered the position to him. The fact that Claimant may have obtained either job had he been more motivated, aggressive, and assertive in pursing job discussions with Mr. Reilly is not relevant to whether Employer made the job available to him.

In *Berkstresser v. Washington Metropolitan Area Transit Authority*, the Board affirmed a finding by the ALJ that a job within the employer's facility was not available to the claimant when the job was never offered. 16 BRBS 231, 233 (1984). The claimant was physically able to perform the job, but the company physician believed the claimant was poorly motivated so the job was never formally offered to the claimant. *Id*. The Board distinguished cases detailing the burden of the employer in showing suitable alternative employment from cases in which suitable alternative employment was located in the employer's facility. *Id*. at 34. The Board reasoned that "where a job which the employer relies on to establish availability of alternative employment is within its exclusive power to provide, and the claimant is actually considered for the job, employer may not claim that the job is available to claimant while refusing to offer it to him." *Id*.

Like *Berkstreser*, I find that Employer never effectively presented Claimant with the option of fulfilling a position as a HSE coordinator or as a service supervisor because there is no evidence of a written offer of employment, Claimant testified that he would be wiling to undertake such jobs, Claimant undertook the duties of a service supervisor for three months without being promoted, and Employer's only evidence that it offered Claimant a position is based on Mr. Reilly's unspecific after the fact notations in Claimant's personnel file.

C(2)(c)(iii) Functional Test Inspector

I do not find that Employer's offer of a position in its Houston facility as a functional test inspector constitutes an offer of suitable alternative employment. Alternative employment must be available in Claimant's local community. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1042-43 (5th Cir. 1981). *See also Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977) (concluding that jobs that are sixty-five to two-hundred miles away are not within the geographical area even if the claimant undertook such jobs before his injury). Houston, Texas is over two-hundred miles from Lafayette, Louisiana. Accordingly, that job cannot constitute suitable alternative employment.

Furthermore, I find that the position as a functional test inspector exceeded Claimant's physical restrictions as set by Dr. Franklin. Claimant testified that he was familiar with the position and that it entailed breaking down and repairing safety valves, and required lifting of up to eighty pounds. (Tr. 74-75). Also some of the testing lasted up to twenty hours, and he would not be able to conduct such testing because he needed frequent breaks. (Tr. 75). Likewise Mr. Reilly testified that parts of the job would require Claimant to lift more than forty pounds, but the facility had an overhead crane and a warehouse man to assist Claimant in lifting. (CX 6, p. 22). The position also required a lot of standing, but Claimant could use a stool. *Id*. at 23. The job paid $14.00 per hour, the work week was forty hours, and Claimant was not required to undergo any additional training.

Id. at 23.

Similar to the job as a tool supervisor, the job as a functional test inspector entailed lifting greater than forty pounds. Dr. Franklin preferred a lifting limitation of twenty pounds and he only altered Claimant's lifting restrictions to forty pounds to accommodate Claimant's light duty position where eighty percent of his time was spent on the telephone. Mr. Reilly testified that Claimant would have the help of an assistant to help lift any objects, but Mr. Reilly was not going to be Claimant' supervisor in Houston and Claimant had no real guarantee that a position that would ordinarily violate his physical restrictions would be modified on a consistent basis so that he could perform the duty. Accordingly, I find that the job as a functional test inspector did not constitute suitable alternative employment because the job was not located in Claimant's geographic area, and in the alternative, the position exceeded Claimant's physical restrictions.

C(2)(d) Post Injury Wage Earning Capacity - Shutdown of Employer's Facility

Employer terminated Claimant's job on May 25, 2001, when it closed its facility. (EX 5, p. 1). Ordinarily, an employer is not a long term grantor of employment. *Olsen v. Triple A Machine Shops*, 25 BRBS 40 (1991); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). Once an injured employee establishes a *prima facie* case of total disability, is offered a light duty position or modified work in the employer's facility, and the employee is laid off due to reasons not associated with his performance, the light duty job within the employer's facility does not establish suitable alternative employment or post injury wage earning capacity. *Northfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999) (determining that the employer made a post-injury light duty position "unavailable" through a lay-off and to rebut the employee's *prima facie* case of total disability the employer had to do more than point to its own internal light duty job); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 25 (1988) (finding that once the employer laid the injured worked off from his post-injury light duty job the suitable alternative employment was no longer available and the employer failed to prove that the injured worker could perform other work); *Becker v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 329 (ALJ 2000) (same). Accordingly, because Claimant established a *prima facie* case of total disability and he was laid off for reasons not associated with his performance, his economic disability became total and not partial on May 26, 2001.[2]

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[2] Mr. Stampley's June 2000 labor market survey does not establish a post-injury wage earning capacity effective retroactively to June 2000. Mr. Stampley only identified categories of jobs which he deemed Claimant was capable of performing. Apart from the positions as a dispatcher, discussed more thoroughly, *infra*, Mr. Stampley never showed that the jobs he identified, such as electrician helper, cabinet assembler, etc., were available and the physical requirements of the jobs, other than labeling them light or medium, were never discussed. *See P & M Crane Co. v. Hayes*, 930 F.2d 424 (5th Cir. 1991) (stating that the employer must show the general availability of jobs openings in certain fields but need not provide information about specific job openings). Apart from the dispatcher positions, none of the jobs were shown to Dr. Franklin to determine if it fell within Claimant's physical limitations or modified work restrictions.

C(2)(e) Post Injury Wage Earning Capacity - Establishing Suitable Alternative Employment Subsequent to Lay-Off

On July 2, 2002, Mr. Stampley conducted a labor market survey locating the following positions:

Parts Store Operator - this position is located in Baton Rouge, Louisiana, with the Department of Transportation and Development, and entry level pay is between $8.19 and $13.55 per hour. The job entails ordering, receiving, inspecting, and storing parts for vehicles and heavy equipment. The physical exertion level is light to medium with a maximum lifting of thirty pounds. A college degree is preferred.

Dispatcher - this position is with Sam Broussard Trucking located in New Iberia, Louisiana and entails answering telephones, using a computer, and talking to drivers on a radio. Two years of dispatching experience is preferred. The position is full time and sedentary and pays an hourly rate of $8.65 to $10.57 per hour.

Dispatcher - this position is with Frank's Casing Crew and Rental Tools located in Lafayette, Louisiana, and entails receiving incoming calls, checking incoming and outgoing tools, and making decision of what tools to send on a job. The position is full time at forty to sixty hours per week, and pays $8.00 per hour without oil field experience, $10.00 per hour with oilfield experience and $11.00-$12.00 per hour with oilfield dispatching experience.

Trucking Dispatcher - this position is with Ace Transportation located in Broussard, Louisiana, and entails taking calls and dispatching trucks from the terminal site and troubleshooting for customer calling in orders after hours. Light clerical duties are necessary and oilfield knowledge is helpful. The position is sedentary and pays $1,800 per month, or an hourly rate of $10.38.

I do not find that the position as a parts store operator in Baton Rouge constitutes suitable alternative employment because Baton Rouge is located over sixty-five miles from Maurice, Louisiana where Claimant lives, and is not within Claimant's geographical locality. *See supra* part C(2)(c)(iii).

I also find that the three positions as a dispatcher are not currently suitable as alternative employment for Claimant. Suitable alternative employment are such positions that do not require any additional training or education. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981) (stating the employer must show that work is available within the claimant's physical ability, educational ability, age, and experience); *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21, 29 (1979) (finding that the refusal to undergo rehabilitation training is not a factor in determining the extent of a claimant's disability). In this case the jobs as a dispatcher do not fall within Claimant's educational experience.

No party disputes that Claimant has oilfield experience that forms an ideal background for a position of a dispatcher. Additionally, there is no evidence that Claimant's intelligence or ability to coordinate and organize personnel and equipment is such that a position as a dispatcher is unobtainable. The position, however, also requires some basic keyboarding and/or computer skills.[3] Mr. Stampley opined that Claimant was capable for perform the job because Claimant told him that he cold type about twenty-one words per minute. (Tr. 181-85, 224-25). That assertion by Claimant, however, was made based on a test he had taken in high school, over twenty years ago. (Tr. 57-58). Mr. Stampley testified that Claimant would have a better chance of obtaining a dispatcher's position if he had more computer experience, and increased his typing speed. (Tr. 184-85). Claimant could obtain the needed skills by enrolling in two to three months of vocational training. (Tr. 185). Similarly, Mr. Kramberg did not think that Claimant's computer literacy or keyboarding skills were sufficient as of the date of trial to qualify him for a job as a dispatcher. (Tr. 269). Claimant needed a three month computer/keyboarding training period to have a decent chance at obtaining a position as dispatcher. (Tr. 270-71, 273). Based on Claimant's immediate skills his chance of obtaining a job as a dispatcher was a mere possibility and not a probability. (Tr. 275). I credit the statement by Mr. Kramberg, that for Claimant to realistically obtain a job as a dispatcher, he needed to undergo additional computer/keyboarding training. Accordingly, I find that the three positions Mr. Stampley identified as a dispatcher are not reasonably available to Claimant.

D. Section 914(e) Penalties

Section 914(a) of Title 33 of the U.S. Code, provides that compensation "shall be paid . . . promptly . . . without an award, except where liability to pay compensation is controverted by the employer." Section 14(c) requires the employer to give notice to the deputy commissioner "upon suspension of payment for any cause." Section 14(d) requires the employer, if it "controverts the right to compensation," to file with the deputy commissioner, within fourteen days after knowledge of the alleged injury, a notice of controversion. Section 14(e) calls for a ten percent penalty when pre-award benefits are not timely paid, unless the employer filed a timely notice of controversion. Here, Employer reduced Claimant's compensation following his lay-off on May 25, 2001 without filing a notice of controversion. Accordingly, Employer is liable for Section 14(e) penalties of ten percent on all unpaid installments since that date.

E. Conclusion

I find that Claimant's credibility is questionable. Claimant established a *prima facie* case of total disability because he cannot return to his former pre-injury employment as a service specialist.

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[3] This is not to say that keyboarding or computer skills are a prerequisite to obtaining such a job. The hiring supervisor at Ace Transportation related that he was open to training the right person. (Tr. 265). The standard for establishing suitable alternative employment, however, is not whether the injured employee has a possibility of obtaining a certain job, rather the employer must show that the available job must be one for which an injured worker could realistically and likely secure. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981).

During his light duty employment in Employer's facility, Claimant acted reasonably in declining to undertake jobs as a tool supervisor and functional test inspector. Likewise, I find that while Employer discussed positions as the HSE coordinator and service supervisor with Claimant, it never formally offered Claimant those positions. After Employer shut down its facility, Claimant's economic disability reverted from partial to total, and Employer failed to establish suitable alternative employment because it either listed jobs outside of Claimant's geographical area, or listed jobs as a dispatcher for which Claimant was not able to perform without undergoing training. In the alternative, Employer established suitable alternative employment as a dispatcher as of July 2, 2002, and Claimant failed to rebut Employer's showing through a diligent job search.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record,

I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 23, 1996 to October 7, 1996, based on an average weekly wage of $1,031.91, and a corresponding compensation rate of $687.94;

2. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908(e) of the Act for the period from October 8, 1996 to April 28, 1997, based on an average weekly wage of $1,031.91, and a post-injury wage earning capacity of $340.00 per week, for a corresponding compensation rate of $461.27 (1,031.91 - 340.00 = 691.91 x 2/3);

3. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c) of the Act for the period from April 29, 1997 to May 25, 2001, based on an average weekly wage of $1,031.91, and a post-injury wage earning capacity of $340.00 per week, for a corresponding compensation rate of $461.27 (1,031.91 - 340.00 = 691.91 x 2/3);

4. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from May 26, 2001, and continuing, based on an average weekly wage of $1,031.91, and a corresponding compensation rate of $687.94;

5. Employer shall be entitled to a credit for all wages paid to Claimant after March 23, 1996;

6. Employer shall pay a penalty pursuant to Section 14(e) of the Act on all unpaid wage benefits from May 26, 2001;

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge